

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

METSO PAPER USA, INC.,	:	Civil Action No.:	3:CV-08-47
	:		
Plaintiff,	:		
	:		
v.	:		
	:		
GENERAL ELECTRIC COMPANY,	:		
	:		
Defendant.	:		

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO
PRECLUDE TESTIMONY OR EVIDENCE RELATED TO ANALYSIS OF OTHER
METAL HALIDE BULBS PERFORMED BY H.K. KYTOMAA**

AND NOW COMES Plaintiff Metso Paper USA, Inc., by and through its counsel, Howard A. Rothenberg, Esq. and Robert A. Stern, Esq. (*pro hac vice*), and hereby submit this Memorandum of Law in Opposition to Defendant's Motion in *Limine*.

Factual Background:

This lawsuit arises out of a fire that occurred on January 21, 2006, at Metso's facility located in Clarks Summit, Pennsylvania (the "Property"). The fire occurred when a certain Defendant GE 750 watt Metal Halide Bulb ("the Bulb") exploded violently and without warning, showering shattered glass and quartz, heated to temperatures well in excess of most ignition points for products kept in a warehouse, and ignited materials stored on holding racks in the origin room. Consequently, Metso's Property was damaged by fire, smoke and water. Plaintiff's damages total \$573,384.00.

The Bulb at issue was installed in a fixture hanging from the ceiling. The ceiling was approximately twenty (20) feet high. At no time prior to the loss did Metso ever notice a decrease in the intensity of the Bulb, nor was there any indication that failure or explosion of the Bulb was imminent. The Bulb was in use for less than three (3) years. At no time before the loss did Metso know that the Bulb could violently explode, or that as a result of such explosion

that hot fragments of quartz and glass capable of igniting plastics and other materials would be propelled throughout the origin room.

Discussion:

A motion *in limine* is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered. *See, Meridian Oil and Gas Enterprises Inc. v. Penn Central Corp.*, 418 Pa.Super. 231 (1992), *alloc. denied*, 534 Pa. 649 (1993). The purpose of a motion *in limine* is twofold: (1) to provide the trial court with a pre-trial opportunity to carefully weigh and consider potentially prejudicial and harmful evidence; and (2) to preclude evidence from ever reaching a jury that may prove to be so prejudicial that no instruction could cure the harm to the non-proffering party. *See, Commonwealth v. Noll*, 443 Pa.Super. 602 (1995), *alloc. denied*, 543 Pa. 726 (1996).

Defendant identified Harri K. Kytomaa, as one of its testifying experts. Defendant exchanged Dr. Kytomaa's report. Dr. Kytomaa testified in this litigation at a deposition on January 25, 2011. There is no question that Dr. Kytomaa is a testifying expert, whose education, employment, experience and knowledge are all at issue for purposes of establishing his qualifications to testify as an expert, and for purposes of challenging his observations, tests, methodology, findings and opinions.

Dr. Kytomaa testified that he has performed tests on high intensity discharge lights, at the request of Defendant and/or defense counsel. Plaintiff is entitled to cross examine Dr. Kytomaa on all this background, including those tests.

Defendant raised an alleged defense that Metso misused the product and/or disregarded its instructions by placing combustibles beneath the subject lamp (which Metso denies). Dr. Kytomaa states in his expert report: ". . . Metso overlooked the recommendations provided by GE and used S-rated lamps *in the presence of combustible materials*. . . ." (emphasis added).

Because the lamp was approximately 20 feet above the floor, and situated over an aisle, Metso complied with Defendant's language on the sleeve accompanying the subject bulb: "Keep combustible materials away from lamp." Dr. Kytomaa's tests and knowledge of the speed at which fragments could leave the lamp, and the dynamics of non-passive failures is information which Metso is permitted to inquire about during cross-examination. The information will assist the Jury in determining Dr. Kytomaa's experience, bias, and may even actually assist the Jury in understanding the science involved in this matter (which Defendant wants to keep out of the case) - - how far from the fixture those fragments of hot quartz can travel; the zone of danger of personal injury or property damage in relation to an exploding bulb. This is all relevant and admissible information, and proper cross examination.

Dr. Kytomaa's past working relationship with Defendant or defense counsel is relevant evidence for the Jury to consider on the issue of bias, and is necessary for the jury to properly consider the weight to be accorded to Dr. Kytomaa's testimony. Dr. Kytomaa's tests and knowledge, undertaken on Defendant's or defense counsel's behalf is also relevant evidence for the Jury to consider with regard to the issue of punitive damages, since that information may be vital in the Jury's mind to a consumer's determination of how far away combustible materials need to be kept from these bulbs.

Dr. Kytomaa is not a non-testifying expert. In the case cited by Defendant, Quinn Construction, Inc. v. Skanska USA Building, Inc., 263 F.R.D. 190 (E.D. Pa. 2009), the Court defined a non-testifying expert as one "retained to provide pre-litigation advice and has not been disclosed as a testifying expert" Dr. Kytomaa has been disclosed by Defendant as a testifying witness. In Quinn, Quinn filed a motion to compel production of a report by one of Skanska's non-testifying experts on the ground that the report was provided to, and utilized by, one of Skanska's testifying experts. Skanska resisted production claiming the report was

protected "core" attorney work product. The Court held that any privilege had been waived and granted the motion. The Court specifically rejected Skanska's argument that its testifying expert made his own independent analysis of Quinn's performance on the Skirkanich Hall project relying on project records and "did not analyze, utilize, consult or rely upon the [Warner Report] in any way in connection with the preparation of our expert reports for this case."

Courts have interpreted the scope of information "considered by" an expert broadly. *See Synthes Spine*, 232 F.D.R. at 464 (a "plaintiff must disclose all materials, regardless of privilege, that plaintiff's expert generated, reviewed, reflected upon, read, and/or used in formulating his conclusions, even if these materials were ultimately rejected by plaintiff's expert in reaching his opinions."). Given this broad definition, Farooqi's admission that he reviewed the Warner Report to obtain an "overview" of the issues involved in the litigation, prior to his firm's conducting an independent analysis of its own, is sufficient to establish that Farooqi "considered" the Warner Report in forming his opinions.

As material considered by a testifying expert, the Warner Report is subject to the disclosure requirements of Rule 26(a)(2)(B)(ii), and as such, its protection as attorney work product has waived. The Court will therefore grant Quinn's motion to compel and order Skanska to produce the Warner Report.

Upon the authority of Quinn, it is of no consequence whether Dr. Kytomaa has not referred to or relied upon his tests on high intensity discharge lights. He engaged in the tests, gained knowledge from those tests and Metso is entitled to cross examine him on those tests.

Dr. Kytomaa testified under oath at a deposition on January 25, 2011 that he performed multiple tests on high intensity discharge lights, wherein he intentionally caused non-passive failures of lights and lamps in order to understand the speed the fragments could leave the lamp at, and the dynamics of these particular events in connection with a "Western Canada" case (p.61); and, the Western Canada case, similar to this litigation, involved a fire at a food warehouse (p.21) and one of Defendant's high intensity Discharge Metal Halide bulbs (p.24).

If Metso is prohibited from examining Dr. Kytomaa about all his past tests and experience, the Court should simply grant Metso's Motion in *Limine* to preclude Dr. Kytomaa.

Normal cross-examination involves covering the exact subjects which Defendant seeks to preclude Metso from covering during cross-examination.

If Dr. Kytomaa's past results and opinions were known to him, they are known and subject to inquiry. Further, if the results and opinions hurt Defendant, what a surprise Defendant does not want Dr. Kytomaa to consider those results and opinions, or allow Metso to discuss those results and opinions. Why would Defendant's expert rely upon information which hurts Defendant.

Defendant states in its Motion that Dr. Kytomaa is its "lighting expert." However, as Dr. Kytomaa's curriculum vitae (See Exhibit A) clearly reflects, he is not a lighting expert at all. If Defendant is claiming he is a lighting expert and he has performed tests involving lights, Metso is entitled to cover these subjects.

If other exploding bulb cases are "unrelated" to this litigation, then Dr. Kytomaa has no relevant experience with these type of bulbs and he must be precluded from testifying. Also, for Defendant to argue that the events are unrelated simply reflects Defendant's misunderstanding of what this case is partly about - - Defendant having knowledge that its bulbs explode and completely ignoring that fact, and continuing to sell its "S" rated bulbs and warning users.

The fact is, all of Dr. Kytomaa's past experience, tests and opinions must be admissible for the Jury to decide what if any weight to give to Dr. Kytomaa's testimony. Although defense counsel believes it is the judge and it has determined that such information is not admissible, the fact is defense counsel is not the judge. Until the information is disclosed, the Jury will not be in a position to determine whether the information hurts, helps or is neutral to Defendant.

Defendant misapplies the non-testifying expert disclosure rules. These rules apply to a non-testifying expert in the present matter, not a testifying expert in the present matter who was in the past for some other matter a non-testifying expert. Once a person is designated as a

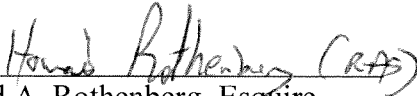
testifying expert, the adversary is permitted to cover that testifying expert's entire past. What Defendant is trying to do is no different than a manufacturer hiring a single person to investigate case after case, and that person in case after case reaching a negative opinion for the manufacturer; then, in a subsequent case, Defendant finally decides to litigate the case to trial, discloses that person as a testifying expert and wants to hide all the past bad results/opinions.

Finally, Defendant and defense counsel retained Dr. Kytomaa in a few past matters involving bulbs. Dr. Kytomaa performed tests and reached conclusions. Metso is most certainly entitled to examine Dr. Kytomaa on all that information. If Defendant does not want Dr. Kytomaa properly cross examined, Defendant should not call Dr. Kytomaa as a testifying expert.

For all the foregoing reasons, it is respectfully requested that Defendant's Motion in *Limine* to preclude testimony and evidence related to analysis of other metal halide bulbs performed by H.K. Kytomaa be denied.

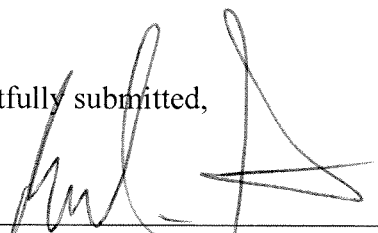
Dated: April 7, 2011

By:


Howard A. Rothenberg, Esquire
Herlands Rothenberg & Levine
345 Wyoming Avenue – Suite 210
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Respectfully submitted,

By:


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Defendant.	:	

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CERTIFICATE OF SERVICE

I, Robert A. Stern, Esquire, attorney for Plaintiff, served Plaintiff's Opposition to Defendant's Motion in Limine To Preclude Testimony Or Evidence Related to Analysis Of Other Metal Halide Bulbs Performed By H.K. Kytomaa upon Defendant's counsel below named, via first class mail and electronic filing on this 7th day of April, 2011, addressed as follows;

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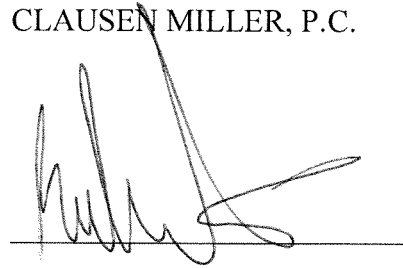
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Respectfully Submitted,

CLAUSEN MILLER, P.C.

By:

A handwritten signature in black ink, appearing to read 'Robert A. Stern', is written over a horizontal line.

Robert A. Stern, Esq. (admitted pro hac vice)

Attorneys for Plaintiff

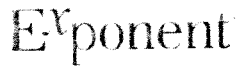
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EXHIBIT A



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Harri K. Kytömaa, Ph.D., P.E., CFEI, CFI
Corporate Vice President

Professional Profile

Dr. Harri Kytömaa is a Corporate Vice President and Director of the Thermal Sciences Practice, specializing in mechanical engineering and the analysis of thermal and flow processes. Dr. Kytömaa applies his expertise to the investigation and prevention of failures in mechanical systems, including combustion equipment. He also investigates fires and explosions, and the determination of their cause and origin. Dr. Kytömaa investigates such failures in aircraft, motor vehicles, marine facilities, industrial and manufacturing complexes, and office and residential occupancies. He has also provided consultation to the power generation, oil and gas, chemical, pulp and paper, and metal smelting industries. Dr. Kytömaa's project experience includes turbines, compressors, boilers, smelters, pneumatic and hydraulic systems, instrumentation, nuclear waste management, heat transfer systems, flammable vapors, flammable liquids, CO formation and migration and cryogenic liquids including LNG and its associated equipment.

Dr. Kytömaa has decades of experience in the area of dynamics and analysis of piping systems containing both liquids and gases. He has developed modeling tools to describe the response of liquid and gas piping systems to artificially induced sources of flow pulsation, as well as to natural sources such as those associated with reciprocating and rotating equipment, and piping components. He has applied these tools to modeling the dynamics and acoustics of drilling fluid filled piping systems for acoustic telemetry and Measurement-While-Drilling systems (MWD), which was one of the enabling technologies for directional drilling. Dr. Kytömaa has also applied his flow and acoustic expertise to gas piping and rotating equipment including gas turbines and compressors. This experience includes the characterization of rapidly varying pressures and forces caused by the interruption of rotating equipment or the sudden closing of valves and their effects.

Dr. Kytömaa has held several academic, research, and consulting positions, including that of Associate Professor of Mechanical Engineering at the Massachusetts Institute of Technology where he was head of the Fluid Mechanics Laboratory. He has also held positions as Visiting Professor at the Helsinki University of Technology and at the DOE Pacific Northwest Laboratory in Washington, and most recently, served as Lecturer in the Department of Mechanical Engineering at the Massachusetts Institute of Technology.

Academic Credentials and Professional Honors

Ph.D., Mechanical Engineering, California Institute of Technology, 1986
M.S., Mechanical Engineering, California Institute of Technology, 1981
B.Sc., Engineering Science, Durham University, England (with Honors), 1979

Registered Professional Mechanical Engineer, California, #34290; Louisiana, #PE.0035054, Massachusetts, #48202; Certified Fire and Explosion Investigator (CFEI) in accordance with the National Association of Fire Investigators (NAFI) National Certification Board per NFPA 921 Section 11.6.4; Certified Fire Investigator (CFI) in accordance with the International Association of Arson Investigators; National Waste Operations and Emergency Response Training, 29 CFR 1910.120; Fire Investigation 1A Certification accredited by the California State Fire Marshal

Sigma Xi; Lewis F. Moody Award for best paper on a subject useful in engineering practice presented to American Society of Mechanical Engineers (ASME), 1993; Henry L. Doherty Professor in Ocean Utilization, 1991–1993; Chairman, Organizing Committee, Engineering Foundation Workshop, Davos, Switzerland, 1993; National Science Foundation Review Panelist, Washington, DC, 1990; National Science Foundation Group Leader, Acoustic Methods Workshop on Visualization of Particulate Two-Phase Flows, Washington, DC, 1990; Diver in the Finnish Navy, rank Able Seaman, Distinguished Service, 1980; Institute of Mechanical Engineers Prize for Outstanding Project Work (United Kingdom), 1979

Publications and Published Abstracts

Myers TJ, Long RT, Gavelli F, Kytömaa HK. The use of smoke detector sequence of activation in determining the area of origin of a fire: investigation of the FedEx DC-10 fire. Proceedings, International Symposium on Fire Investigation Science and Technology, Cincinnati, OH, 2008.

Myers TJ, Hinze PC, Kytömaa HK. Fire and explosion in an explosives conditioning bunker. Proceedings, 42nd Annual Loss Prevention Symposium, American Institute of Chemical Engineers Spring National Meeting, New Orleans, LA, 2008.

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Invited Lectures and Presentations

Kytömaa HK, Myers TJ, Ibaretta AF, Ponchaut NF. Anatomy of the failures that led to the Buncefield explosion and fire. Mary Kay O'Connor Process Safety Center Symposium, College Station, TX, 2009.

Kytömaa H. LNG pool spreading. LNG Safety Workshop, LNG Tech Global Summit 2007, Rotterdam, Netherlands, September 10, 2007.

Kytömaa H. LNG release from a vessel. Mary Kay O'Connor Process Safety Center: CLNG Workshop at the Hamilton Crowne Plaza, Washington, DC, June 12–13, 2007.

Gavelli F, Chernovsky MK, Bullister E, Kytömaa HK. Validation of a CFD model for vapor dispersion from LNG spills into an impoundment. American Institute of Chemical Engineers Spring National Meeting, Houston, TX, April 2007.

Kytömaa H. LNG hazards for offshore and onshore LNG receiving terminals. Invited speaker/faculty member, LNG Development in the Northeast, Boston MA, December 5, 2006.

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Kytömaa H. Garage and house fires. Bowman and Brooke, LLP, Hot Topics Seminar Series, Toyota USA, Los Angeles, CA, December 15, 2003.

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Kytömaa H. Use of PowerPoint in the court room. International Association of Defense Counsel, Tucson, AZ, February 2002.

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Professional Affiliations

Member: American Society of Mechanical Engineers; American Institute of Chemical Engineers; Society of Fire Protection Engineering; Sigma Xi, The Scientific Research Honor Society; National Fire Protection Association

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Testimony History

Provenza v Yamaha Motor Company Ltd.	Deposition Evidentiary Hearing	District Court of Clark County Nevada Case No: A446708	2006
Betsey Murray v Eldean Yacht Basin, Ltd d/b/a Yacht Basin Marina	Deposition	State of Michigan in the Circuit Court for the County of Ottawa File No: 05-52932-NZ	2006 2007
El Dorado Chemical Company and Northwest Financial Company v Ingersoll-Rand Company	Deposition Trial	The Circuit Court of Union County Arkansas Case No.: CV2005-0444	2006
Rose Marie Holt and Robert Holt, Sr. v Royal Insurance Company of America, Great American Insurance Group and Tops Malibu, Inc. v Cascade Candle Company and Sonoco Products Co. v Vision Group International Corp. and David M. Dillion d/b/a Vision Group International Corp.	Deposition	Providence Superior Court C.A. No. 02-6299	2006
Metrokane, Inc. v. Built NY, Inc.	Deposition	United States District Court Southern District of New York No: 06-CV-14447 (LAK) (MHD)	2007
Employers Insurance Company of Wausau v. Medline Industries, Inc. and Creative Bedding Technologies, Inc.	Deposition	The United States District Court for the Middle District of Tennessee No. 3:06-0611	2007
Richard J. Lueders, Susan M. Lueders, Bethany Thomas, Estates of Thomas P. Lueders v. Key Hospitality & Healthcare Limited Partnership and Doubletree Grand Key Resort	Deposition	The Circuit Court of the Sixteenth Judicial Circuit and for Monroe County, Florida Case No. 2007-CA-97-K	2008
Joseph A. Beauregard, Jr. v Altec Industries, Fluidtech, Inc., Hydroforce and Timothy Healey	Deposition	Superior Court Commonwealth of Massachusetts Case No: 99-2119	2008

<p>Colour Quest Ltd, Shell UK Ltd., West London Pipeline and Storage Ltd. United Kingdom Oil Pipeline Ltd., et al</p> <p>v.</p> <p>Total Downstream UK Plc, Total UK Ltd., Hertfordshire Oil Storage Ltd., Chevron Ltd., Total Milford Haven Refinery, TAV Engineering Ltd., Motherwell Control Systems 2003 Ltd.</p>	Trial	<p>In the High Court of Justice Queen's Bench Division Commercial Court in re The Buncefield Incident Folio No. 1057</p>	2008
<p>Appleton Paper Inc and NCR Corporation</p> <p>v.</p> <p>George A. Whiting Paper Company, et al</p> <p>NCR Corporation</p> <p>v.</p> <p>Kimberly-Clark Corporation, et al.</p>	Deposition	<p>United States District Court for the Eastern District of Wisconsin Green Bay Division Case No. 08-CV-16-WCG Case No. 08-CV-0895-WCG</p>	2009
<p>Chestnut Village Condominium Trust</p> <p>v.</p> <p>Linc Credit LLC PP and Laars Heating Systems Company</p>	Trial	<p>United States District Court District of Massachusetts</p>	2009
<p>Motor Fuel Temperature Sales Litigation Practices</p>	Deposition	<p>United States District Court for the District of Kansas Case: 07-MD-1840-KHV/JPO</p>	2009
<p>Gila River Power, L.P and Union Power Partners LP v General Electric Company</p>	Deposition Arbitration	<p>United States District Court of Massachusetts Docket No: 71-198-Y-0040907</p>	2009 2010
<p>Alliance Pipeline Limited Partnership and Alliance Pipeline L.P.</p> <p>v.</p> <p>C.E. Franklin Ltd. Mannesmann Demag AG, et al</p>	Arbitration	<p>Court of Queen's Bench of Alberta Judicial District of Calgary</p>	2010
<p>Kay A. Reed and Charlie Wear, Trust Administrators for the Vornado Trust</p> <p>v.</p> <p>Tyco Electronics Corporation, Global Wire Technologies of Indiana, Inc. GWT Investments, Inc.</p>	Deposition	<p>Superior Court of the State of California Case No. CGC-05-441279</p>	2010

Compensation

Exponent Failure Analysis Associates, Inc. is compensated at \$495.00 per hour for Harri K. Kytömaa's services.

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